

## 7-5.000 PROCEDURES

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### **7-5.100 Investigations**

Pursuant to 28 C.F.R. Sec. 0.40(a), the Assistant Attorney General in charge of the Antitrust Division has supervisory authority over all investigations involving possible violations of the antitrust laws. When a United States Attorney wishes to conduct such an investigation, he/she must obtain the approval of the Antitrust Division before beginning. The initial investigation of a potential antitrust violation is called a preliminary inquiry. The Antitrust Division's field office chiefs and their designated liaisons to specific United States Attorney's offices are the United States Attorney's primary contacts within the Antitrust Division regarding investigations and litigation. *See* USAM 7-3.700. The Division's Deputy Assistant Attorney General for Criminal Enforcement, Room 3214, Main Justice (202-514-3543), may also be contacted.

### **7-5.200 Standards for Initiating a Preliminary Inquiry**

Generally, a preliminary inquiry should be initiated if the facts presented appear to support a legal theory of an antitrust violation and the investigation will not duplicate other efforts of the Antitrust Division, the Federal Trade Commission, or another United States Attorney. (Investigations of suspected criminal antitrust violations may be initiated, where appropriate, through a request for grand jury authority rather than through a request to conduct a preliminary inquiry. *See* USAM 7-5.310.)

Based on these general guidelines, a request for preliminary inquiry authority is reviewed, in the case of violations involving mergers and acquisitions, by the Antitrust Division's Director of Operations, Room 3214,

Main Justice (202-514-3544), and in all other cases by the Antitrust Division's Deputy Director of Operations, Room 3208, Main Justice (202-514-2562). If the request meets these standards and clearance is obtained from the Federal Trade Commission, see USAM 7-5.220, preliminary inquiry authority is granted.

### **7-5.210 Making a Request for Preliminary Inquiry Authority**

If a United States Attorney believes that a matter is appropriate for a preliminary inquiry, a short memorandum (1-3 pages) should be prepared describing the nature and scope of the suspect activity. The memorandum must contain sufficient information to permit the Antitrust Division to evaluate the request, obtain Federal Trade Commission clearance, and determine whether any section or field office of the Antitrust Division or the Federal Trade Commission is investigating, or has investigated, the same activity. NOTE: An instruction sheet for preparing a Memorandum Seeking Preliminary Inquiry Authority is in the Antitrust Resource Manual at 3. This memorandum should be addressed to the Director or Deputy Director of Operations, Antitrust Division, as noted in USAM 7-5.200. Approval, subject to Federal Trade Commission clearance, should take no more than three working days and may be expedited when necessary.

### **7-5.220 Federal Trade Commission Clearance Procedure**

All requests to initiate new antitrust investigations must be cleared with the Bureau of Competition of the Federal Trade Commission, in accordance with a longstanding inter-agency agreement. The purpose of the inter-agency clearance is to ensure that the two enforcement agencies, which have concurrent jurisdiction in certain areas, do not duplicate efforts by conducting similar or identical investigations. The Office of Operations will arrange to obtain Federal Trade Commission clearance on behalf of the United States Attorney. An investigation of criminal conduct, e.g., bid rigging or price fixing, is invariably and promptly cleared by the Federal Trade Commission.

### **7-5.230 Assistance From the Antitrust Division**

The discussion of investigating and proving price-fixing and bid-rigging violations, *see* USAM 7-4.100, provides a brief overview of antitrust investigative techniques. In addition, the Antitrust Division, through its local field offices, *see* USAM 7-3.700, can provide advice regarding investigative techniques and evidentiary issues unique to antitrust matters.

The Antitrust Division's Economic Litigation Section, Economic Regulatory Section or Competition Policy Section, collectively the Economic Analysis Group or EAG, can also provide economic analysis of particular issues, as well as statistical assistance, if the investigation requires it, and can serve as, or obtain, expert witnesses.

### **7-5.300 Antitrust Grand Jury Investigations**

Pursuant to 28 C.F.R. Sec. 0.40(a), the Assistant Attorney General in charge of the Antitrust Division must authorize any grand jury investigation of possible antitrust violations. Consultation with the Deputy Assistant Attorney General for Criminal Enforcement or the local field office may be desirable at the time the United States Attorney's Office is formulating a request for grand jury authorization.

## **7-5.310 Requesting a Grand Jury Investigation**

If, based upon evidence initially presented to the United States Attorney or at the conclusion of a preliminary inquiry, the United States Attorney believes that there is sufficient evidence to proceed to the grand jury, the United States Attorney should request authority to conduct a grand jury investigation from the Assistant Attorney General in charge of the Antitrust Division. The request for grand jury authority should be in the form of a brief memorandum sent to the Deputy Assistant Attorney General for Criminal Enforcement, Room 3214, Main Justice (202-514-3543) for review. See Antitrust Resource Manual 4 for instructions on preparing a Memorandum Seeking Grand Jury Authority. If this grand jury memo initiates the investigation, i.e., if no preliminary inquiry was required, the Deputy Assistant Attorney General for Criminal Enforcement will seek Federal Trade Commission clearance based upon the grand jury request memorandum. The Deputy Assistant Attorney General then submits it to the Assistant Attorney General, who approves or disapproves the request. The United States Attorney is advised promptly of the decision. This approval process generally takes no more than three working days, and may be expedited where necessary.

In the course of a grand jury investigation of other criminal conduct, a United States Attorney often also will develop evidence of antitrust violations. Such evidence may support either inclusion of antitrust counts in an indictment charging other crimes or indictment on antitrust charges alone. As soon as such evidence is identified, the United States Attorney should contact the chief of the local Antitrust Division field office (or that office's United States Attorney liaison), or the Deputy Assistant Attorney General for Criminal Enforcement, to apprise him/her of the possible antitrust violations, and to determine that no office of the Antitrust Division or the Federal Trade Commission is investigating the same conduct. Although, under these circumstances, further development of the evidence regarding the antitrust violations through the grand jury does not require authorization by the Assistant Attorney General, subsequent consideration of any proposed antitrust cases or counts may be expedited by keeping the Antitrust Division generally apprised of antitrust developments.

## **7-5.400 Completing the Investigation and Recommending Civil or Criminal suits**

As the United States Attorney develops evidence that may establish a violation of the antitrust laws, he/she should begin to determine what count or counts will be recommended and how the investigation might be concluded. The Deputy Assistant Attorney General for Criminal Enforcement, field office chiefs and liaisons, and other contacts within the Antitrust Division are available for consultation in this regard.

Three tasks usually are undertaken at the conclusion of an investigation. First, the United States Attorney determines whether to proceed with criminal or civil antitrust charges and selects the defendants to be recommended for prosecution. Second, the United States Attorney may, at his/her discretion, give counsel for the potential antitrust defendants an opportunity to present their views to the prosecutors. Finally, the United States Attorney and the staff prepare a brief prosecution memorandum and pleadings for the antitrust charges. See USAM 7-5.410. This fact memorandum should be received by the Deputy Assistant Attorney General for Criminal Enforcement if criminal charges are contemplated, or the Director or Deputy Director of Operations if civil charges are contemplated, at least two weeks before the case is scheduled to be filed.

Upon receipt of the fact memorandum, the Deputy Assistant Attorney General for Criminal Enforcement, the Director of Operations, or Deputy Director of Operations will assess the merits of the antitrust charges. This review will focus primarily upon whether the facts as set forth meet the legal and policy requirements for an antitrust violation. Assessment of the weight of the evidentiary support for the antitrust charges and litigation strategy will be left to the United States Attorney. The Assistant Attorney General in charge of the Antitrust Division makes the final decision whether to seek an indictment, file a civil suit or decline prosecution.

## **7-5.410 Preparation of Fact Memorandum**

The fact memorandum should be prepared by the United States Attorney's staff as a brief summary statement of the factual and legal basis for the proposed charges. See Antitrust Resource Manual at 5 for instructions on preparing a Criminal Case Fact Memorandum. The purpose of the fact memorandum is to serve as a vehicle for consideration of the case in the review process, including identification of any antitrust policy issues that the case may raise.

The fact memorandum should be prepared after any meetings with defense counsel, and, if appropriate, allowing the "targets" to appear before the grand jury.

The memorandum should be forwarded to the Antitrust Division accompanied by all pleadings (indictments, informations or complaints as well as any proposed plea agreements or consent decrees) in the matter and a draft press release. Sample pleadings and press releases are available from the Deputy Assistant Attorney General for Criminal Enforcement, the Office of Operations and from the field offices.

## **7-5.420 Civil Actions Generally**

Civil antitrust actions are usually brought under Sections 1 and 2 of the Sherman Act (15 U.S.C. Secs. 1 and 2), Section 7 of the Clayton Act (merger cases) (15 U.S.C. Sec. 18), and Section 4A of the Clayton Act (Federal antitrust damage actions) (15 U.S.C. Sec. 15a). Few civil actions are initiated by United States Attorneys. Given the more complex issues of antitrust policy and analysis involved, civil cases generally rely upon "Rule of Reason" analysis. See USAM 7-4.100; 7-4.200. Such analysis requires substantial economic input and evaluation. The Director or Deputy Director of Operations, or the local Antitrust Division field office, can provide advice to United States Attorneys contemplating the filing of a civil antitrust action.

## **7-5.500 Procedures for Review of Case Recommendations**

After drafting the fact memorandum, pleadings and a press release, the package is sent to the Deputy Assistant Attorney General for Criminal Enforcement, or for civil cases to the Director or Deputy Director of Operations, for review. (As previously noted, sample pleadings and press releases are available from the Deputy Assistant Attorney General for Criminal Enforcement, the Office of Operations, and the field offices.)

Upon review, and after consultation with the United States Attorney, the Deputy Assistant Attorney General for Criminal Enforcement, or the Director or Deputy Director of Operations, will submit his/her recommendation to the Assistant Attorney General. This process generally will take no more than ten working days and may be expedited where necessary. See USAM 7-5.400.

Only in rare circumstances, where significant and novel issues are raised, will counsel for the potential defendants be provided with an opportunity to meet with the Assistant Attorney General. Generally, the Deputy Assistant Attorney General for Criminal Enforcement (or another appropriate Division official in cases involving civil matters) will meet with counsel for a proposed defendant, if such a meeting is requested.

The United States Attorney will be informed immediately when a final decision is made by the Assistant Attorney General. The approval papers, signed pleadings, and any other additional information that will be required for filing will be sent to the United States Attorney.

When the case is filed, the United States Attorney's office should immediately inform the Deputy Assistant Attorney General for Criminal Enforcement (or for civil cases the Director or Deputy Director of Operations) of that fact so that he/she may authorize issuance of the press release. The United States Attorney's office also should inform the Deputy Assistant Attorney General for Criminal Enforcement (or the Director or Deputy Director of Operations in civil cases) of the docket number and the judge assigned to the case.

## **7-5.600     Litigation**

Pursuant to 28 C.F.R. Sec. 0.40(a), the Assistant Attorney General in charge of the Antitrust Division has supervisory authority over all antitrust suits brought by the Department. Although the United States Attorney's office handling a particular case is responsible for all pre-trial and trial activities, consultation with the Deputy Assistant Attorney General for Criminal Enforcement in criminal cases, or the Director or Deputy Director of Operations in civil cases, is required whenever issues of antitrust policy or novel issues of antitrust law are raised in litigation.

## **7-5.610     Disposition of Antitrust Actions**

Disposition of a criminal antitrust case by plea or dismissal must be approved by the Assistant Attorney General in charge of the Antitrust Division after review by the Deputy Assistant Attorney General for Criminal Enforcement. Disposition of a civil antitrust action by settlement or dismissal must also be approved by the Assistant Attorney General in charge of the Antitrust Division after review by the Director or Deputy Director of Operations. Such approval may be obtained orally through the Deputy Assistant Attorney General for Criminal Enforcement or the Director or Deputy Director of Operations.

## **7-5.611     Plea Agreements**

Plea agreements require the approval of the Assistant Attorney General where counts are being dismissed, companies are being promised no further prosecution, or particular sentences are being recommended. The Deputy Assistant Attorney General for Criminal Enforcement must be advised of any proposed plea agreement before it is finalized.

## **7-5.612     Settlements**

Civil settlements require the approval of the Assistant Attorney General where charges are being dismissed, particular injunctive relief is being recommended, or a claim for damages is being compromised. Civil antitrust settlements must also follow the procedures established by the Antitrust Procedures and Penalties Act. *See* 15 U.S.C. Secs. 16(b)-(h). The Director or Deputy Director of Operations must be advised of any proposed civil settlement before it is finalized.

## **7-5.613     Sentencing Recommendations**

Sentencing recommendations should be consistent with the U.S. Sentencing Commission Guidelines for sentencing antitrust violations. USSG §2R1.1. Sentencing recommendations must be approved by the Assistant Attorney General, through the Deputy Assistant Attorney General for Criminal Enforcement, prior to their submission to the Probation Office.

## **7-5.620     Appeals**

The Antitrust Division's Appellate Section is responsible for handling all appeals in antitrust cases. At the conclusion of a case that may involve an appeal, the United States Attorney should consult with the Division's Appellate Section through the Deputy Assistant Attorney General for Criminal Enforcement for criminal cases, or the Director or Deputy Director of Operations for civil cases.